The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 2412
INTRODUCER:	Senator Bennett
SUBJECT:	Debt Settlement Services
DATE:	April 20, 2009
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	**Favorable**
2.	Daniell/Maclure	Maclure	JU	**Favorable**
3.			GO	
4.			GA	
5.				
6.				

I. Summary:

In the last few years an increasing number of disreputable companies have been capitalizing on the current economic turmoil and the credit and debt woes of consumers. These unscrupulous entities engage in deceptive and misleading marketing practices (i.e., promising the cancellation of debts for pennies on the dollar) or charge egregious fees for debt negotiation or debt management services that will never be provided.

Part IV of ch. 817, F.S., governs the regulation of credit counseling services and debt management services. These entities were originally created to assist consumers in financial difficulty gain control of their personal finances and reduce and repay unsecured debts for a fee. Chapter 817, F.S., provides limits on the fees that can be charged for such services.

The bill requires persons providing debt settlement services to obtain licensure from the Office of Financial Regulation (OFR or the Office). Debt settlement services include negotiating and obtaining more favorable terms on existing debt for a client for a fee. The bill:

- Requires debt settlement advisors to register and renew annually with OFR in accordance with specified requirements, and authorizes OFR to investigate and examine these entities.
- Establishes grounds for denying registration; establishes prohibited acts for debt settlement advisors, including limitations on fees and debt settlement amounts; and establishes standards for debt settlement agreements.
- Requires registrants to maintain insurance coverage. In lieu of the insurance, registrants may obtain a minimum $10,000 surety bond for the use and benefit of any client who suffers any loss due to any violation of this act.

This bill will have a fiscal impact on OFR since this office will be responsible for licensing, examining, and regulating these entities. The number of debt settlement providers in Florida is indeterminate at this time.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Persons providing credit counseling services, debt management services, and other debt relief services generally assist people with managing their personal debt. These organizations may attempt to help debtors avoid foreclosure and bankruptcy, reduce interest rates on loans, and lower or consolidate monthly loan payments. These organizations may also offer individual counseling for developing budgets, managing money, using credit, and building a savings plan. These services can be provided through local offices, the Internet, or the telephone. According to the Department of Legal Affairs, over 5,300 consumer complaints related to credit repair and debt relief were reported to the department last year.[1]

Federal Regulation of Consumer Credit Counseling and Credit Repair Services

The debt relief industry is comprised of businesses providing products designed to assist consumers in dealing with debt, including credit counseling, credit repair, and debt settlement. Federal laws have been enacted to protect consumers from deceptive and fraudulent practices involving credit counseling and debt repair. The Federal Trade Commission has jurisdiction to enforce certain federal consumer protection laws through the Federal Trade Commission Act,[2] which prohibits unfair or deceptive trade practices; the Telemarketing and Consumer Fraud Act;[3] and the Credit Repair Organizations Act.[4]

Florida Regulation of Credit Counseling and Debt Repair Services

Credit Counseling

In Florida, credit counseling agencies are organizations providing credit counseling services or debt management services.[5] The term "credit counseling services" means confidential money management, debt reduction, and financial educational services. "Debt management services" generally means services for a fee to adjust or discharge the indebtedness of the debtor.[6] Persons engaged in credit counseling or debt management services are prohibited from charging fees to any consumer or debtor residing in Florida in excess of amounts prescribed in s. 817.802, F.S.

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[1] Office of the Attorney General of Florida, *McCollum: Credit Repair, Debt Elimination Schemes Common Topics of Florida Complaints* (News Release, Mar. 4, 2009), *available at* http://myfloridalegal.com/__852562220065EE67.nsf/0/EB4A7C357DE2ABB48525756F0064006B?Open&Highlight=0,debt (last visited April 19, 2009).
[2] 15 U.S.C. s. 45(a).
[3] 15 U.S.C ss. 1601-1608.
[4] 15 U.S.C. ss. 1679.
[5] Part IV, ch. 817, F.S.
[6] Section 817.801, F.S.

Each person providing credit counseling or debt management services must obtain an annual financial audit and maintain insurance coverage for employee dishonesty, depositor's forgery, and computer fraud.

Credit counseling agencies often advertise that they work with clients to create a debt repayment plan that minimizes monthly payments, interest, and related fees. Generally, consumers provide monthly payments to the credit counseling service, and the agency uses the money to pay unsecured loans and other debts in accordance with a payment schedule that has been agreed upon with the debtor and creditor.

Under Florida law, no state agency is specifically charged with enforcing the laws regulating credit counseling agencies. A violation of any provision of part IV of ch. 817, F.S., is an unfair or deceptive trade practice under the Florida Deceptive and Unfair Trade Practices Act.[7] Accordingly, the Department of Legal Affairs can enforce Part II of ch. 501, F.S., against credit counseling agencies engaging in unfair and deceptive trade practices.[8] A consumer harmed by a violation of this act may bring an action for recovery of damages, costs and attorney's fees. A person who violates any provision of the act commits a third-degree felony.

Credit Service Organizations

Part III of ch. 817, F.S., governs credit service organizations (CSOs). A CSO means "any person who, with respect to the extension of credit by others, sells, provides, performs, or represents that he or she can or will sell, provide, or perform, in return for the payment of money or other valuable consideration, any of the following services:

1. Improving a buyer's credit record, history, or rating;
2. Obtaining an extension of credit for a buyer; or
3. Providing advice or assistance to a buyer with regard to the services described in either subparagraph 1 or subparagraph 2."[9]

In order for a CSO to charge or receive money or other valuable consideration prior to full and complete performance of services that a CSO agrees to perform for a buyer, a CSO must obtain a surety bond of $10,000 issued by a surety company admitted to do business in this state and establish a trust account at a financial institution located in this state. A CSO is required to provide buyers with information statements in writing, containing provisions set forth in ss. 817.703 and 817.704, F.S.

Under Florida law, no state agency is specifically charged with enforcing the laws regulating credit service organizations, although the Department of Legal Affairs could enforce part II of ch. 501, F.S., against debt settlement companies engaging in unfair and deceptive trade practices. A consumer harmed by a violation of this act may bring an action for recovery of actual and punitive damages, costs, and attorney's fees. A person who violates any provision of the act

[7] Part II, ch. 501, F.S.
[8] If a violation occurs in or affects one circuit, the state attorney for that circuit may also enforce Florida's Deceptive and Unfair Practices Act. See s. 501.203(2), F.S.
[9] Section 817.7001(2)(a), F.S.

commits a third-degree felony, punishable by not more than five years in prison and a fine of up to $5,000.[10]

Although debt settlement services negotiate with creditors to reduce the consumer's debt in exchange for an agreement of regular repayments, debt settlement services do not handle consumer money. Instead, the consumer is required to set up a separate bank account or use an escrow company in making the new payments with the creditor. Debt settlement services are generally for-profit entities that operate mostly on fees charged to the consumers. The fees are often based on the total amount of debt handled and amount saved by the debtor.

According to the Federal Trade Commission (FTC), some debt negotiation programs can be very risky and have long-term adverse impact on a consumer's credit report. Some companies will direct their customers to cease making payments to their creditors, and instead send payments to the debt negotiation company or to a bank account established for the consumer. According to the FTC, the goal of debt settlement is to save enough cash, while not paying creditors, so that the creditors will offer a fraction of the balance owed as settlement in lieu of the full debt.[11] If a consumer stops making payments on a credit card, late fees and interest generally continue to accrue on the account. The FTC notes that most debt negotiation companies charge consumers substantial fees – a fee to establish an account, a monthly service fee, and a final fee of a percentage of the money attributable to savings.[12]

In 2005, a report by the National Consumer Law Center, Inc., noted the following concerns regarding debt settlement companies:

- The consumers targeted by debt settlement companies are generally the least likely to benefit.
- Very few consumers ever complete a debt settlement program. Settling debts can be a long process. In the interim, consumers continue to face collection efforts and the accrual of additional fees and interest on the debt.
- The fees are high. The report noted that the fees are so high that the consumers do not end up saving much in the "reserve accounts."
- It is unclear what professional service most debt settlement companies offer to assist debtors during the time they are saving money for settlement.[13]

III. Effect of Proposed Changes:

This bill requires debt settlement services providers to be licensed with the Office of Financial Regulation (OFR or the Office). The bill defines a "debt settlement advisor" as a person who provides debt settlement services to a client, and the term also includes an employee or agent of the debt settlement advisor. "Debt settlement services" is defined as services provided for a client by a debt settlement advisor who acts as an intermediary between the client and unsecured

[10] Sections 817.705 and 817.706, F. S.
[11] Federal Trade Commission, *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public* (March 24, 2009) (prepared Statement of the Federal Trade Commission before the U.S. House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection).
[12] Federal Trade Commission, FTC Facts For Consumers, *Knee Deep in Debt* (Dec. 2005).
[13] Nat'l Consumer Law Ctr., Inc., *An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers* (March 2005).

creditors for the purpose of obtaining favorable concessions[14] for the client. The following services are exempted from the definition of debt settlement services:

- Legal services provided by licensed Florida attorneys;
- Accounting services provided by licensed Florida CPAs; or
- Financial planning services provided by a member of a financial planning profession.

This bill creates licensure requirements for a person who "intends to provide or offers to provide debt settlement services." A debt settlement advisor is subject to annual registration with OFR. The application fee may not exceed $150. The debt settlement advisor must provide proof that the entity is covered by a minimum insurance policy in an amount specified by OFR. In lieu of insurance, the applicant may file for a surety bond with OFR for a term not less than the expiration date of the license, and the bond must be in an amount of at least $10,000. The surety bond is for the use and benefit of any client who suffers any loss due to any debt settlement service from a debt settlement advisor. The Office may require an applicant to file a bond greater than $10,000 if it determines that it is necessary, but OFR cannot require a surety bond greater than $50,000, regardless of the monetary value of the transactions.

The bill requires OFR to approve or deny an initial licensure application within 60 days of the application's completion (OFR may extend the 60-day period but not by more than 45 days). The Office may deny or refuse to issue an initial license for a materially erroneous or incomplete application and for a conviction of a crime involving dishonesty, or the violation of state or federal securities laws. Applicants can also be denied if there has been a civil judgment entered against them involving dishonesty or if there is reasonable evidence that the applicant will not operate as a debt settlement advisor in a lawful, honest, or fair manner. The bill also provides a means for licensure for debt settlement advisors who have a license from another state. The application from the other state must be substantially similar to the application required by OFR.

A licensed debt settlement advisor is required to apply for renewal annually and must file for renewal at least 30 days in advance but not more the 60 days prior to the renewal date.

The debt settlement agreement must be in writing, signed by both the client and debt settlement advisor, and state that the client has a right to terminate the agreement at any time by giving the debt settlement advisor written or electronic notice. The agreement may allow the debt settlement advisor a power of attorney to settle a client's debt, but for no more than 50 percent of the principal amount of the debt. Before accepting a concession settlement of more than 50 percent of the principal amount of the debt, the advisor must obtain the client's consent.

A debt settlement agreement may be cancelled by a client up to three business days after the execution of the agreement. The agreement must be accompanied by a form that notifies the client of the right to cancellation. If the agreement does not comply with the cancellation notice or report filing requirements, then the client may cancel the agreement within 30 days of the agreement's execution.

[14] "Concessions" means consent to repay a debt on terms more favorable to a client than the terms of the original contract between a client and a creditor.

A debt settlement advisor may not impose a fee or other charge on a client unless authorized by this act. The bill prohibits debt settlement advisors from assessing fees in excess of 20 percent of the principal debt and requires that the client sign the debt settlement agreement before the advisor can charge fees. Debt settlement advisors are prohibited from soliciting a voluntary contribution from a client or affiliate of a client for any debt settlement services. If the debt settlement advisor imposes a fee not authorized by the bill, the client may void the contract.

Debt settlement advisors must maintain records for each of their clients for at least four years after the client's final payment. The bill provides that in specified situations the debt settlement advisor must provide accounting reports that contain information, such as the amount of the client's debt when the creditor agrees to a settlement and the amount of the debt the creditor accepts as settlement of the debt.

The bill prohibits debt settlement advisors from engaging in specified acts, including but not limited to:

- Settling a debt on behalf of a client for more than 50 percent of the amount of the pre-settlement debt unless the client agrees in writing to the settlement;
- Holding a power of attorney that authorizes the debt settlement advisor to settle a debt, unless the power is limited to the settlement of debts not more than 50 percent of the amount of the debt owed;
- Structuring a settlement that results in a negative amortization schedule for repayment of any of a client's debts; or
- Using deceptive and unfair trade practices, including the knowing omission of any material information.

This bill authorizes OFR to enforce this act and rules adopted under this act by:

- Ordering an advisor to cease and desist from any violation;
- Ordering a debt settlement advisor to correct a violation, including making restitution of money or property to the person aggrieved by the violation;
- Imposing a civil penalty not to exceed $1,000 for each violation; and
- Initiating an enforcement action in the circuit court.

The bill allows a client who voids an agreement to recover all money paid. Clients injured by a debt settlement advisor's violation of this act may seek the greater of compensatory damages or $1,000 from advisors, in addition to attorney's fees and costs. There is a limitation of liability for advisors acting in good faith and who can demonstrate that the violation was not intentional. The bill sets a statute of limitation of four years for any enforcement action and a statute of limitation of two years for any private enforcement action.

The bill provides an effective date of July 1, 2009.

Other Potential Implications:

It is unclear how this bill, if implemented, would interact with, or in any other way affect, existing state laws governing credit counseling organizations and debt settlement found in ch. 817, F.S. Because the bill does not repeal existing law, it creates ambiguity as to the application of parts III and IV of ch. 817, F.S., and thus raises issues as to whether OFR or the Department of Legal Affairs would enforce these conflicting provisions.

For example, debt settlement advisors would not be handling debtors' money, but their services could still constitute either credit counseling services or debt management services (if they affect the adjustment, compromise, discharge of any unsecured account, note, or other indebtedness of the debtor), under s. 817.801(2) and (4), F.S. Debt settlement services could also constitute services provided under part III of ch. 817, F.S., relating to credit service organizations, to the extent a person provides advice or assistance to a buyer with regard to "improving the buyer's credit record, history, or rating" or to "[o]btaining an extension of credit for a buyer."[15]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Consumers facing financial hardships may benefit from services provided by persons providing debt settlement services to the extent such services assist the consumers in reducing their debts. However, the fee cap of 20 percent is considerably higher than the fee cap provided in part IV of ch. 817, F.S. Section 817.802(1), F.S., prohibits a person, while engaging in debt management services or credit counseling services, from charging or accepting a fee greater than $50 for the initial consultation. Subsequently, the person may not charge or accept a fee greater than $120 per year for additional consultations, or, alternatively, if debt management services are provided, the person may charge

[15] See s. 817.7001(2), F.S., governing the definition of "credit service organization" under part III of ch. 817, F.S.

7.5 percent of the amount paid monthly by the debtor or $35 per month, whichever is greater.

Persons providing debt settlement services would be subject to licensure by the Office of Financial Regulation (OFR or the Office). The initial licensure fee may not exceed $150, and the renewal fee may not exceed the cost of processing the renewal.

C. Government Sector Impact:

Since the number of potential licensees is indeterminate, it is unclear whether revenues generated from the licensure and renewal fees would adequately fund this program in OFR. The Office would need staffing for legal, licensing, examination, and support.

VI. Technical Deficiencies:

On line 416, the bill uses the term "consumer" rather than client. The Legislature may wish to change the term to client to provide consistency throughout the bill.

Licensure Requirements

The bill impairs the Office of Financial Regulation's (OFR or the Office) ability to determine whether an applicant meets all of the conditions for licensure, because OFR would be required to recognize licenses received in other states in lieu of requiring licensure under Florida's laws. A debt settlement advisor would be allowed to obtain a license from OFR if he or she holds a license or certificate of licensure from another state, if the other state's licensing requirements are "substantially similar to or more comprehensive than that requested in the application submitted in this state." No other regulatory program in the Division of Finance of OFR allows applicants to participate in an interstate reciprocity agreement in regard to licensure.

The bill does not require applicants to submit fingerprints as part of the licensure or renewal process. This would impair OFR's ability to deny licensure or renewal of a person that had a state or federal criminal background. The bill does not authorize OFR to deny a license to a person who has committed fraud or moral turpitude.

The bill requires applicants to submit proof of a minimum insurance policy in an amount specified by OFR, or a surety bond in an amount of at least $10,000 but no greater than $50,000, regardless of the total monetary value of the transactions. However, the bill does not require licensees to submit proof of continued insurance or bond coverage at annual renewal, nor does it give OFR specific authority to suspend or revoke a license if a licensee fails to maintain the insurance coverage or surety bond.

Additionally, the bill provides that an applicant may post a bond, rather than acquire insurance, which will be used "in favor of any clients in this state who suffer loss arising out of debt settlement services from a debt settlement advisor." It appears that if one applicant posts a bond, that bond could be used for the benefit of a client of another debt settlement advisor.

Administrative Procedure Act

The licensing provisions conflict with the current provisions in ch. 120, F.S., the Administrative Procedure Act, governing licensure approval and denial. The bill states that OFR would have 60 days to make a decision on an application after it is *submitted*. The general 90-day decision period in the APA provides that an agency must notify an applicant of any deficiencies in his or her application within 30 days of receiving the application. Agencies must then approve or deny an application within 90 days of receiving a *completed* application, unless a shorter period of time for agency action is provided by law.

On line 328, the bill addresses the continuity of a license during the pendency of an "appeal proceeding." To provide consistency with ch. 120, F.S., this phrase should be replaced with an "administrative proceeding under chapter 120, Florida Statutes."

Lines 323-326 of the bill provide that if OFR denies an application to renew a debt settlement license, the debt settlement advisor may appeal the denial within 30 days after receiving the notice of denial. However, on lines 296-299, relating to filing an appeal if OFR denies or does not act on an initial application for a debt settlement license, the bill does not prescribe a time line for filing such an appeal.

Enforcement Provisions

The bill provides that the "remedies of this act are in addition to remedies otherwise available for the same conduct under state law," and that this "act is supplemental to, and makes no attempt to preempt, other consumer protection laws that are not inconsistent with this act." However, it is unclear whether a person licensed as a debt settlement advisor would still be subject to parts III and IV of ch. 817, F.S., particularly the fee caps and criminal liability of those parts. Under the bill, a licensed debt settlement advisor can charge fees up to 20 percent of the principal as opposed to the $50 and $120 caps under s. 817.802(1), F.S.

This bill provides that, in bringing administrative actions or proceedings, OFR would have four years "after the conduct of the violation occurs." Current statutes within OFR's regulatory jurisdiction generally do not contain such statutes of limitations.

The bill also permits a private cause of action against a debt settlement advisor, but also contains a good-faith defense, intent, and a statute of limitation, none of which are present in parts III and IV of ch. 817, F.S. It is unclear how the bill and the current statutory provisions would be interpreted.

VII. Related Issues:

This bill requires a debt settlement advisor to respond to a client's complaint "*within a reasonable time* following the debt settlement advisor's receipt of such complaint." However, there is no specified time period.

The bill requires that the renewal application be accompanied "by the fee established by the office, which may not exceed the cost of processing the renewal." It is unclear what the renewal fee would be and whether it would be established by rule.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.